State of Michigan
Supreme Court

Appeal from the Michigan Court of Appeals
Whitbeck, C.J., and Sawyer and Saad, J.J.

HERALD COMPANY, INC., d/b/a,
BOOTH NEWSPAPERS, INC. and
THE ANN ARBOR NEWS,
Plaintiff-Appellant

v.

EASTERN MICHIGAN UNIVERSITY
BOARD OF REGENTS,
Defendant-Appellee.

Supreme Court
No. 128263

Court of Appeals
No. 254712

Washtenaw County
Circuit Court
No. 04-117-CZ

BRIEF OF DEFENDANT-APPELLEE EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS

ORAL ARGUMENT REQUESTED

MARY MASSARON ROSS (P43885)
MICHAEL S. BOGREN (P34835)
PLUNKETT & COONEY, P.C.
Counsel for Defendant-Appellee
535 GRISWOLD, SUITE 2400
DETROIT, MI 48226
(313) 965-4801

TABLE OF CONTENTS

Page

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

FEDERAL CASES

OUT-OF-STATE CASES

COURT RULES

STATUTES

CONSTITUTIONAL PROVISIONS

LEGAL TREATISES & TEXTS

LAW REVIEW MATERIALS

OTHER AUTHORITIES

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction of this appeal because it granted a timely application for leave to appeal filed by the Herald Company, Inc. in its order of June 17, 2005. Judgment was entered in the trial court on March 16, 2004. The Herald timely claimed an appeal. (Claim of Appeal, 4/12/04). The Court of Appeals had jurisdiction pursuant to MCR 7.203 and MCR 7.204. The Court issued its decision affirming summary disposition in favor of the Eastern Michigan University Board of Regents on February 10, 2005. The Herald timely filed its application seeking leave to appeal from this Court on March 21, 2005.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I.

DID THE COURT OF APPEALS CORRECTLY APPLY THE DEFERENTIAL STANDARD OF REVIEW AS ARTICULATED IN *FEDERATED PUBLICATIONS, INC v LANSING*, 467 MICH 98; 649 NW2D 383 (2002)?

Herald Company, Inc. d/b/a Booth Newspapers, Inc. & The Ann Arbor News answers "No."

Eastern Michigan University Board of Regents answers "Yes."

The Court of Appeals answers "Yes."

The Washtenaw County Circuit Court answers "Yes."

II.

DID THE CIRCUIT COURT CORRECTLY UPHOLD EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS' DECISION TO EXEMPT A LETTER FROM DISCLOSURE WHERE THE LETTER SATISFIED ALL ELEMENTS OF MCL 15.234(1)(m) AND THE BALANCE OF INTERESTS IN THE PARTICULAR INSTANCE SUPPORTS THE CONCLUSION THAT THE PUBLIC INTEREST IN THE QUALITY OF THE UNIVERSITY'S DELIBERATIVE DECISION-MAKING PROCESS CLEARLY OUTWEIGHED THE PUBLIC INTEREST IN DISCLOSURE WHERE ALL OF THE FACTS HAD BEEN RELEASED AND WERE PART OF THE PUBLIC RECORD?

Herald Company, Inc. d/b/a Booth Newspapers, Inc. & The Ann Arbor News answers "No."

Eastern Michigan University Board of Regents answers "Yes."

The Court of Appeals answers "Yes."

The Washtenaw County Circuit Court answers "Yes."

III.

DID THE CIRCUIT COURT CORRECTLY CONCLUDE THAT THE LETTER WAS NOT SUBJECT TO DISCLOSURE BECAUSE IT CONTAINED OTHER THAN PURELY FACTUAL INFORMATION WHICH COULD NOT BE DISCLOSED WITHOUT REVEALING THE PROTECTED CANDID COMMUNICATION?

Herald Company, Inc. d/b/a Booth Newspapers, Inc. & The Ann Arbor News answers "No."

Eastern Michigan University Board of Regents answers "Yes."

The Court of Appeals answers "Yes."

The Washtenaw County Circuit Court answers "Yes."

COUNTERSTATEMENT OF FACTS[1]

A. INTRODUCTION.

The Herald Company, Inc., d/b/a Booth Newspapers, Inc. and The Ann Arbor News (collectively referred to as the Herald) brought suit under Michigan's Freedom of Information Act (FOIA), MCL 15.231 et seq., complaining that the Eastern Michigan University Board of Regents (the Board) improperly exempted a letter from disclosure to the public. The circuit court issued a written opinion concluding that the Board had sufficiently articulated a particularized justification for application of the exemption under FOIA. (Opinion and Order, 3/12/04; Apx 6b). In a 2 to 1 decision, the Court of Appeals affirmed the circuit court's March 12, 2004 Opinion and Order Denying Plaintiffs Emergency Motion to Compel Immediate Disclosure of Public Record and Granting Summary Disposition to Defendant. (Opinion, Apx 11b; Dissenting Opinion, Apx 26b).

B. THE CHARACTER OF THE PLEADINGS AND PROCEEDINGS.

A reporter for the Ann Arbor News sent several FOIA requests to Eastern Michigan University (hereafter EMU) seeking a number of public records relating to the University President's new house on the EMU campus. (Complaint, ¶¶ 9-10; Apx 41b). In response, the Board produced all documents except for a letter from Vice-President Doyle to Regent Jan

---

[1]In its statement of material proceedings and facts, the Herald violates MCR 7.212(6), which is incorporated into MCR 7.306, by failing to state all material facts both favorable and unfavorable without argument or bias. The statement weaves together procedural facts and substantive proofs in a confusing manner. The factual recitation contains argument and legal analysis, which do not belong there. It also includes reference to non-record matters, such as what the Herald purports to know about the contents of the Doyle letter "from various sources." (Brief on Appeal Plaintiff-Appellant Herald Company, pp 1-7). The Herald offers statements from the dissenting opinion regarding Doyle's decision to retire which have no support in the record and no citation is supplied other than the citation to the dissenting opinion, which is not a proper basis for finding factual support in the record. The factual statement of the brief should therefore be disregarded or stricken by this Court.

Brandon, which the Board exempted from disclosure citing the "inter-agency" exemption to the FOIA, MCL 15.243(13)(1)(m). (Complaint, ¶¶ 11-14; Apx 41b). Former EMU Vice President for Business and Finance, Patrick Doyle, had sent the letter dated September 3, 2003, to EMU Regent, Jan Brandon. (Plaintiffs' Complaint, Exhibit D; Apx 51b). In response to the FOIA request, EMU's FOIA Coordinator, Lisa Nardell, sent correspondence dated October 7, 2003 to Ann Arbor News staff writer Janet Miller noting the existence of the letter, stating that it "may be within the scope" of a September 3, 2003 FOIA request, and asserting that the letter was exempt from disclosure pursuant to § 13(1)(m) of FOIA. (*Id.*)

For four months, the Herald took no action with respect to the October 7, 2003 denial. By statute, the Herald had the right to either appeal the denial "to the head of the public body," (MCL 15.235[4][d][i]), or to seek judicial review of the denial under § 10 (MCL 15.240) of the Act (MCL 15.235[4][d][ii]). Instead, the Herald waited almost four months before filing this suit on February 5, 2004. (Complaint, 2/5/04; Apx 39b).

Less than two weeks after it filed suit and without waiting for an answer to the complaint, the Herald sought the full measure of relief that it had requested in its complaint and did so under the guise of an "emergency" need for disclosure. (Emergency Motion, 2/5/04; Apx 53b). The EMU Board argued that it was nothing more than a motion for summary disposition. (Response, 2/13/04; Apx 67b). The circuit court agreed, noting that "Plaintiffs motion is tantamount to a summary disposition motion." (Tr, 2/18/04, p 14; Apx 111b). Even though its motion was, in effect, a motion for summary disposition, the Herald failed to abide by the timing requirements set forth in the court rules for dispositive motions. The motion was also noticed for hearing prior to the time permitted by the court rules. MCR 2.116(B)(2). (Notice of Hearing, 2/5/04; Apx 65b).

Nevertheless, EMU responded to the motion. (Response, 2/13/04; Apx 67b). The EMU Board later filed an answer, the thrust of which was to deny that the Doyle letter was subject to disclosure. (Answer, 2/18/04; Apx 91b). EMU also raised various affirmative defenses. (Affirmative Defenses, 2/18/04; Apx 96b).

The circuit court heard oral arguments on February 18, 2004. (Tr, 2/18/04; Apx 98b). At that time, the Herald urged the circuit court to declare that the Board violated FOIA in not disclosing the letter and to order its immediate disclosure. (Tr, 2/18/04, p 8; Apx 100b). It argued that the Board could not carry its burden of showing that the public interest in nondisclosure outweighed the public interest in disclosure. (Tr, 2/18/04, pp 7-8; Apx 104b-105b). The Herald insisted that FOIA provides for expedited hearings and argued that "[a]ffidavits would be pointless." (Tr, 2/18/04, p 6; Apx 103b). Counsel for the Herald expressly stated, "I don't challenge the offer of proof that they've put in regarding the context of the letter except so far they attempt to make conclusions about whether the letter contains fact or opinion—that's really for this Court to decide—and all that's needed here is an in camera review of the single document." (*Id.*, pp 6-7; Apx 103b-104b). The Herald contended that Board was required to "pull out the disclosable from the nondisclosable" portions of the letter. (Tr, 2/18/04, p 7; Apx 104b).

For its part, the Board pointed out that the Herald had sought an expedited hearing on its motion for summary disposition in a manner that impeded the Board's ability to develop the record regarding the factual context in which the letter was generated. (Tr, 2/18/04, pp 8-10; Apx 105b-107b). The University also addressed the substance of the Herald's position, arguing that the letter was properly exempted from disclosure under the frank communication inter-agency exemption because the public interest in nondisclosure clearly outweighed any interest in disclosure, particularly where the "University has already disclosed literally hundreds of pages of

an investigation and report that was prepared by the Deloitte firm with literally hundreds of pages of factual information supporting that report." (Tr, 2/18/04, p 11; Apx 108b).[2] The Board pointed out that "there's nothing, apart from purely mental impressions, opinions, and so forth that we maintain are clearly covered by the exemption that the Plaintiff is going to learn that they don't already know." (*Id.*, pp 11-12; Apx 108b-109b).

The circuit court observed that the motion was "tantamount to a summary disposition motion" but decided to hear the matter without waiting for additional time. (Tr, 2/18/04, pp 14-15; Apx 111b-112b). The circuit court said that it would be in a position to decide the motion after it reviewed the Doyle letter in camera. (Tr, 2/18/04, p 15; Apx 112b). The Board thereafter provided the letter to the circuit court for its in camera review. (Tr, 2/18/04, p 16; Apx 113b).

C. THE CIRCUIT COURT RULING.

On March 12, 2004, the circuit court issued its written decision. (Opinion and Order, 3/12/04; Apx 6b). Doing so, it first announced that it had reviewed the briefs, heard oral argument, and conducted an in camera review of the document. (Opinion and Order, pp 1-2; Apx 6b-7b). Having done so, the trial circuit court concluded that the Board had sufficiently articulated a particularized justification to exempt the letter from disclosure under FOIA. (Opinion and Order, p 4; Apx 9b).

Based on its in camera review of the letter, the trial court found that (1) the contents of the Doyle letter were of an advisory nature and covered other than purely factual material; (2) the communication was made between officials and/or employees of public bodies; and (3) the communication was preliminary to a final agency determination of policy or action. (Opinion and Order, p 3; Apx 8b). In the circuit court's view, the letter contained substantially more

---

[2]The University had released the audit and held a press conference regarding the Deloitte & Touche audit in mid-December, 2003.

opinion than fact, and the factual material was not severable from the overwhelming majority of the facts, which consisted of Doyle's views concerning the former President's involvement with the University House project. (*Id.*) The circuit court also determined that the letter was preliminary to a final determination of policy or action. It was between officials of public bodies. And it concerned the Board's investigation and ultimate determination of what action, if any, would be taken regarding the University House controversy. (Opinion and Order, p 3; Apx 8b).

In addition, the circuit court found that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighed the public interest in disclosure. (*Id.*) It concluded that the Herald's specific need for the letter was outweighed by the Board's interest in maintaining the quality of its deliberative decision-making process. (*Id.*) Finally, the circuit court noted that the Board had conducted an investigation and published a voluminous and exhaustive report concerning its findings regarding the University House project, a copy of which was furnished to the Herald. (*Id.*) For this additional reason, the circuit court held that the Board properly withheld the Doyle letter because it fell within a FOIA exemption.

D. THE COURT OF APPEALS DECISION.

On March 31, 2004, the Herald filed a claim of appeal from the circuit court's March 12, 2004 Opinion and Order Denying Plaintiff's Emergency Motion to Compel Immediate Disclosure of Public Record and Granting Summary Disposition to Defendant. (Claim of Appeal, 3/31/04). On February 10, 2005, the Court of Appeals issued its opinion. (Opinion; Apx 11b). In that 2 to 1 decision, the Court of Appeals majority held that, because this Court has ruled that the Court of Appeals is to afford deference to trial courts which have the difficult task of balancing public interests under FOIA, because this Court has expressly held that courts are to

uphold a circuit court's balancing judgment unless the circuit court committed clear error, and for the additional reason that the trial court did not clearly err in its ruling, the circuit court's opinion shall be affirmed.

Writing for the majority, Judge Saad first addressed the applicable standard of review. (*Id.*, pp 5-6; Apx 15b-16b). The Court looked to the decision in *Federated Publications v The Lansing State Journal*, 467 Mich 98; 649 NW2d 383 (2002) for the rule of law and the rationale for the appropriate level of deference that a reviewing court should give to circuit courts, which conduct the difficult and fact-intensive balancing test under FOIA. (*Id.*) Adhering to the holding in *Federated Publications*, the Court of Appeals majority articulated the appropriate standard of review: exemptions involving discretionary determinations, such as an exemption requiring a circuit court to engage in a balancing of public interests, should be reviewed under a deferential standard and so the clearly erroneous standard of review applies to applications of exemptions requiring determinations of a discretionary nature. (*Id.*) A finding is deemed to be clearly erroneous if, after reviewing the entire evidence, a reviewing court is left with a definite and firm conviction that a mistake has been made. (*Id.*) Thus, the majority concluded that the relevant inquiry under the *Federated Publications* test is whether the circuit court's ruling constitutes clear error. (*Id.*)

The majority explained that the frank communications exemption found at MCL 15.243(1)(m) rests on the policy of protecting the decision-making process of government agencies. (*Id.*, pp 6-8; Apx 16b-18b). Relying on *NLRB v Sears, Roebuck & Co*, 421 US 132, 150; 95 S Ct 1504; 44 L Ed 2d 29 (1975), the Court of Appeals observed that frank discussion of legal or policy matters in writing might be inhibited if the discussions were made public and the decisions and policies formulated would be poor as a result. (*Id.*) The Court further observed that the public has a strong interest in promoting frank communications between government

officials. (*Id.*) The Court reasoned that the legislature determined that the public's interest in promoting frank communications may at times outweigh the disclosure policy of FOIA, and thus included a specific exemption in FOIA to cover frank communications. (*Id.*) Outlining the appropriate analysis to be utilized under the frank communications exemption, the Court of Appeals provided the following methodology:

> Therefore, to conduct its analysis under MCL 15.243, the trial court will ask and answer these questions: (1) did the public body show that the requested document covers "other than purely factual materials"; (2) did the public body show that the document is "preliminary to a final agency determination of policy of action"; and (3) did the public body "establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure?"

(Opinion, p 8; Apx 18b).

Next, the Court of Appeals took up the "clearly outweighs" factor. (*Id.*, pp 8-12; Apx 18b-22b). It explained that, in order to make a proper showing for application of the frank communications exemption, a public body must show that the information falls in the exemption and that non-disclosure clearly outweighs the public's interest in disclosure. (*Id.*) The Court reasoned that the "public has a far greater interest in ensuring that boards of public universities provide effective oversight of the administration's expenditure of public funds then in knowing the opinions of one administrator about another." (*Id.*, p 11; Apx 21b).

As applied to this particular case, the Court of Appeals explained that the EMU Board needs more than "cold and dry data to do its job." (*Id.*) According to the Court, the Board "is dependent upon the unvarnished candid opinion of insiders to make policy judgments and particularly to conduct sensitive investigations of top administrators." (*Id.*) The Court reasoned that "when a high level administrator is asked to give his opinion of the highest ranking official in the administration, the president, his immediate supervisor, whose favor he needs for job security, the insider may naturally be reluctant to trust the outsider and to trust the confidentiality

of the communication." (*Id.*) At the same time, the Court recognized that frank communications are essential to an outside board's ability to discharge its vital constitutional oversight function on behalf of the public. Mindful of these considerations as to the Doyle letter, the Court of Appeals ruled as follows:

> Indeed, this factual scenario strikes us as the prototype the legislature had in mind when it adopted the "frank communication" exemption in FOIA. The express recognition by the legislature of the need for candor and its vital role in internal decision-making and internal investigations gave birth to the "frank communications" exemption and were we to hold the exemption inapplicable under these facts, this may very well sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public.

(Opinion, p 12; Apx 22b). The Court of Appeals expressed agreement with the circuit court's ruling that the public interest in protecting frank communications clearly outweighed the interest in disclosure. Thus, the Court of Appeals concluded that the circuit court had not committed clear error in its ruling:

> There is often a delicate balance between the public interest in disclosure and the public interest in non-disclosure. The trial court must make a careful appraisal of the special circumstances and of all relevant facts to insure that the correct balance is struck. Because the trial court is in a better position to hear testimony and review documents in camera and appraise the multiple factors that influence this balance, its determination should be accorded great deference.

(Opinion, p 12; Apx 22b).

In responding to the dissent, the Court emphasized that the circuit court's job was to conduct the balancing test by weighing one interest against another in light of all of the facts of a particular case. (*Id.*, pp 13-15; Apx 23b-25b). The Court disagreed with the dissent's assertion that it ignored the fact that the frank communications exemption carries with it a "clearly outweighs" mandate. The Court read *Federated Publications* to give the circuit court the discretionary job of weighing public interests and to leave the reviewing court with the obligation of reviewing the trial court's ruling using what *Federated* instructed was a "deferential standard." (*Id.*) The Court recognized that the Michigan Constitution gives the

Board, not the Court of Appeals, the very difficult job of protecting the public interests by ensuring that public funds are properly spent. In the Court's view, there was no question that the Board was able to discharge its duty, due in no small part, to its ability to obtain the opinions and assessments of insiders about other insiders." (*Id.*, p 15; Apx 25b). The Court acknowledged that the "management of such a sensitive mix of an outside board, insiders' opinions about other insiders," and the weighing of motivations and credibilities in a delicate balancing of interest created the unique "in the particular instance" here and supported the trial court's conclusion that the frank communications exemption applied. (*Id.*)

Judge Whitbeck dissented. (Dissenting Opinion; Apx 26b). He accused the majority of substituting its own view of proper policy, i.e., that the process of governing would be hindered in the context of the frank communications exemption by providing access to the Doyle letter, on grounds that were suspect at best when the actual language of the exemption was examined. Judge Whitbeck opined that the majority had conflated the clearly erroneous standard with an abuse of discretion standard. He insisted that the abuse of discretion standard has no application in FOIA cases. (*Id.*, pp 5-7; Apx 30b-32b). Limiting his inquiry to the facts as they existed in his eyes, Judge Whitbeck said that he was at a loss to understand how the public interest in encouraging frank communications "clearly outweighs" the public interest in disclosure. (*Id.*, pp 8-10; Apx 33b-35b). He insisted that the frank communications exemption has its own clearly outweighs standard and is to be taken into account along with the particular instance of a case. (*Id.*, p 12; Apx 37b). He said that under the language of the frank communications exemption, the review necessarily involves a special inquiry into whether the public interest in encouraging frank communications "clearly outweighs" the public interest in disclosure. (*Id.*, p 11; Apx 36b). He observed that the majority ignored the standard by balancing the supposed harm that might flow from the disclosure against the supposed good that might flow from non-disclosure in the

future as a policy matter without regard to the legislatively imposed mandate requiring consideration of the particularized instance of this case. (*Id.*, p 12; Apx 37b).

This Court granted the Herald's application for leave to appeal. (Order, 6/17/05). In its order, this Court requested that the parties "shall include among the issues to be briefed: (1) whether the Court of Appeals correctly applied the appropriate standard of review; (2) whether the Washtenaw Circuit Court clearly erred in applying the § 13(1)(m) Freedom of Information Act exemption, MCL 15.243(1)(m), to the public record in question; and (3) whether purely factual materials, if any, contained within the public record were properly included within the scope of the exemption." (*Id.*)

SUMMARY OF THE ARGUMENT

From the far reaches of history, one can find numerous proverbs and sayings warning about the dangers that stem from candor. Juvenal, a Roman satirist who wrote between 100 and 120 A.D., said, "Honesty is praised and starves." Satires, I, line 74, *Bartlett's Familiar Quotations* (15th ed, 1980), p 121. A Chinese proverb warns, "When you want to test the depth of a stream, don't use both feet." Chinese proverb quoted by Leslie Stahl, *Words of Wisdom* (1989), p 99. An Italian proverb similarly cautions, "Let not your tongue say what your head may pay for." Italian proverb, *Words of Wisdom* (1989), p 374. The oft-heard statement, "Think before you speak" seeks to teach the same lesson. These sayings reflect the timeless wisdom that speaking too freely can lead to trouble. They embody common teaching that is as prevalent in our society today as it has been in the past. Because the consequences of candor are so well known, a natural human tendency to employ caution when speaking causes many to hold their thoughts and opinions back. This is particularly true in any situation in which the words, once spoken, may bring negative consequences to the speaker.

At the same time, it is axiomatic that decisions are only as good as the quality of deliberations and the information available to the decisionmakers. The best decisions are informed by thoughtful, frank, and candid opinions. The best decisions often come after many creative alternatives have been vetted. Management experts urge decisionmakers to "think outside the box." But doing so means considering dubious and ill-conceived options along with brilliant and novel ideas. The decisionmakers engage in a process designed to determine which is which and to reject or refine the proposals before making a decision or adopting a policy. The quality of deliberative decisionmaking is improved when the decisionmakers have access to the frank and unvarnished thoughts, impressions, opinions, and judgments of those who work for them. This truth is undisputed here.

These basic truths form the underpinnings for the frank communications exemption in Michigan's Freedom of Information Act. MCL 15.243(1)(m). The Michigan Legislature studied both the federal FOIA and the abundant decisional authority recognizing a deliberative process privilege to enact an exemption from disclosure for documents within a public body that are preliminary to a decision and other than purely factual. *Id.* The federal counterpart to Michigan's exemption was enacted because of "the strong urging of virtually every Government agency." S Rep No. 1219, 88th Cong, 2d Sess, 13-14. The agencies contended that "[g]overnment officials would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and co-workers if they knew that, at any future date, their opinions of the moment would be spread on the public record." *Id.*

To ensure access to the frank and candid opinions necessary for effective governance, Congress in the federal FOIA, and the Michigan Legislature in the Michigan counterpart adopted an exemption for communications of this nature. Both legislative bodies sought to assure that public bodies would have access to the very best information possible when deliberating over a policy or decision. The idea behind both FOIA statutes was to assure broad disclosure of government decisions and the facts about government operations, but to allow only a narrower disclosure of opinions, recommendations, impressions, and judgments offered as part of the decisionmaking process. *Coastal States Gas Corp v Dep't of Energy*, 617 F2d 854, 866 (DC Cir, 1980) (exemption assures that subordinates are free to provide the decisionmaker with their "uninhibited opinions and recommendations without fear of later being subject to public criticism or ridicule"); *United States v Nixon*, 418 US 683, 705; 94 S Ct 3090, 3106; 41 L Ed 2d 1039 (1974) (rationale for nondisclosure is that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process").

The Michigan Legislature's exemption is narrower than that created by Congress in the federal statute. Compare MCL 15.243(1)(m) with 5 USC 552(b)(5). Unlike under the federal FOIA, which protects deliberative documents categorically and without balancing, the Michigan statute requires a balancing of public interests to determine whether a document should be disclosed in the particular instance. This balancing test, drawn from federal decisional law governing the deliberative process privilege, results in documents falling within the exemption when the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. MCL 15.243(1)(m).

This appeal presents the Court with issues arising out of a trial court's judgment that the EMU Board of Regents was entitled to withhold from disclosure a letter written by its Vice President for Business and Finance, Patrick Doyle, to Regent Jan Brandon, about a matter of controversy, which the Board was in the process of investigating and addressing. The trial court found that the public interest in disclosure was low since the facts regarding the controversy had been released by the University and were in the public domain. Counsel for the Board informed the trial court about the University's exhaustive disclosure of documents as well as its release of a comprehensive forensic audit conducted by Deloitte & Touche. (Tr, 2/18/04, pp 8-11; Apx 105b-108b). The Ann Arbor News and other papers and the public generally had access to numerous documents revealing the history of the project. See e.g., Melchior, *Audit Shows EMU House Project Costs $4.88 Million*, Ypsilanti Courier, 12/18/03; Miller, *EMU President's House Cost More Than Disclosed*, Ann Arbor News, 12/2/03. Thus, as the trial court and Court of Appeals correctly found, the facts were already public and disclosure would not offer any additional facts.

At the same time, the trial court found that the public interest in nondisclosure was high because disclosure would impair its ability to obtain such candid communications in the future.

The letter offered the Board candid and frank impressions and opinions by one of its top employees about his superior and the controversy surrounding the University House. The trial court determined that if an official, such as Doyle, expects that a letter will become public, he might well temper his remarks to avoid public criticism and disagreement by others (including his superiors or his professional colleagues) regarding his perspective. Thus, the Board's need to protect its ability to obtain such candid input meant a strong public interest in nondisclosure existed.

In *Federated Publications v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002), this Court adopted a deferential standard of review for a circuit court's decision regarding the applicability of exemptions to disclosure under FOIA. 467 Mich at 106-107. This Court explained that exemptions involving discretionary determinations such as those requiring the court to engage in a balancing of public interests should be reviewed "under a deferential standard." *Id.* The Court also held that a clearly erroneous standard of review applies to the application of exemptions requiring determination of a discretionary nature. The Court of Appeals applied this deferential standard of review to uphold the circuit court's factual findings and its balancing to determine that the exemption applies. That holding was correct and should be affirmed.

The trial court also properly exempted the entire letter because it contained material that was other than purely factual, MCL 15.243(1)(m), and the factual material was not readily severable from the protected material. This determination was consistent with Michigan's FOIA scheme, which recognizes that disclosure should not take place if disclosure would "defeat the purpose of the exemption." MCL 15.244. To be sure, as the Herald and amici argue, the statute requires a public body to separate exempt from non-exempt material but nothing in this text can be read to suggest that disclosure of factual material that is not readily severable from exempt

material, and that would necessarily disclose the opinions, judgments, and impressions of the author of a frank and protected communication, is required. MCL 15.243(1)(m)'s text applies the exemption broadly to "other than purely factual material." This language can be traced to federal decisions, which broadened the federal exemption to ensure that communications with some facts woven into the opinions or recommendations of their authors were still protected. *EPA v Mink*, 410 US 73; 93 S Ct 827; 35 L Ed 2d 119 (1973); *FTC v Warner Communications, Inc*, 742 F2d 1156, 1161 (CA 9, 1984). And MCL 15.244, on which the Herald relies, does not speak to the contrary. It merely indicates that exempt and non-exempt material should be separated where possible. It then provides:

> If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

MCL 15.244. This language supports the Board's position that the Legislature did not intend to defeat the purpose of the frank communications exemption by disclosing factual material if that factual material would disclose the protected communication. As a result, the trial court's ruling should be affirmed.

ARGUMENT I

THE COURT OF APPEALS CORRECTLY APPLIED THE DEFERENTIAL STANDARD OF REVIEW AS ARTICULATED IN *FEDERATED PUBLICATIONS, INC v LANSING*, 467 MICH 98; 649 NW2D 383 (2002).

The circuit court determined, and the Court of Appeals agreed, that the Board satisfied its burden of proving that the Doyle letter falls within the exemption provided by MCL 15.243(13)(1)(m). In the case of *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 106-107; 649 NW2d 383 (2002), the Court set express limitations on an appellate court's review of discretionary decisions. It specifically described the standard of review as deferential. Where, as here, the circuit court has engaged in a balancing test and has concluded that the defendant satisfied its burden of proof, "the clearly erroneous standard of review applies to the application of exemptions requiring determinations of a discretionary nature." *Id.* at 107. Under the clearly erroneous standard, the lower court's ruling is left undisturbed unless "after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.*, citing *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). An appellate court is not to disturb the trial court's findings simply because the appellate court might disagree.

The Court of Appeals majority correctly held that *Federated Publications* controls here. *Federated Publications* provides the rule of law and the rationale for the appropriate level of deference that an appellate court must give to a trial court, which has conducted the difficult and fact-intensive balancing test under FOIA. Deference is afforded a circuit court in these situations because the court is called upon to make a careful appraisal of the special circumstances and of all relevant facts in order to ensure that the correct balance is struck. A circuit court is far better situated to hear testimony, to review documents in camera, and to take into account the multiple

factors that influence the balancing process. Accordingly, the relevant appellate inquiry under the *Federated Publications* case is whether the trial court's ruling constituted clear error.

In *Federated Publications*, this Court enunciated the standard of appellate review of a circuit court decision. 467 Mich at 105-106. This Court recognized that questions of law are reviewed de novo, but that factual findings and matters of discretion are "reviewed either for clear error or abuse of discretion." *Id.* at 106. Recognizing that review in a FOIA case might implicate different standards of appellate review, this Court announced that review of exemptions "involving discretionary determinations," should be deferential. *Id.* at 107. The Court therefore held that "the clearly erroneous standard applies to the application of exemptions requiring determinations of a discretionary nature." *Id.* This Court then embraced *In re Miller's* definition of clearly erroneous:

> A finding is "clearly erroneous" if, after reviewing the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made.

Id. at 337. This formulation for "clearly erroneous" can be traced to *United States v Gypsum Co*, 333 US 364, 395; 68 S Ct 525; 92 L Ed 746 (1948).

Other courts have emphasized that the "clearly erroneous" standard "echoes equity's presumptively correct deference without making the findings conclusive." Steven Alan Childress & Martha S. Davis, 1 Federal Standards of Review (3rd ed, 1999), p 2.26 citing *Concrete Pipe & Products v Construction Laborers Pension Trust*, 508 US 602, 606; 113 S Ct 2264; 124 L Ed 2d 539 (1993); *Citibank, NA v Wells Fargo Asia Ltd*, 495 US 660; 110 S Ct 2034; 109 L Ed 2d 677 (1990); *Anderson v Bessemer City*, 470 US 564, 673; 105 S Ct 1504; 84 L Ed 2d 518 (1985). *Anderson* explained that if the lower court's "account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

differently." 470 US at 573-574. In adopting this deferential clearly erroneous standard, this Court, like the *Anderson* court, sought to avoid an endless reweighing of a trial court's discretionary balancing of factors at the appellate level. The approach it embraced has often been used to review a trial court's decision based on a multi-factored balancing test.

The standard of review defines "the depth or intensity" of review. J. Dickson Phillips, *The Appellate Review Function: Scope of Review*, 47 Law & Contemp Probs 1, p 1 (1984). The discretionary balancing at issue here requires the Court to perform a mixed law-fact analysis. This Court, in *Federated Publications*, concluded that the trial court was in a superior position to decide the question. Its decision is akin to the approach courts have traditionally applied in reviewing similar evidentiary issues, such as the admissibility of evidence challenged on the basis of FRE 401, FRE 403, and the trustworthiness of a statement against interest. Childress, *supra* at § 4.02. Because FRE 403 requires a "sensitive and on-the-spot balancing of probative value and prejudice," the trial court's rulings "are rarely disturbed on appeal unless there is a clear showing that the judge abused his discretion." *Id.* quoting *United States v Clifford*, 704 F2d 86, 89 (CA 3, 1983). The reviewing court defers to the trial court's individualized choice, which was based on its balancing of the conflicting interests as revealed in the record before the court.

Federated Publications adopted a similar approach for discretionary balancing choices of the type at issue here. The appellate court defers to this choice, under *Federated Publications*, because the trial court is in a superior position to find facts regarding the parties' articulated interests and to weigh and balance them in the particular instance. The majority therefore properly interpreted and applied the standard of review as announced in *Federated Publications*. Contrary to Judge Whitbeck's assertion, which is now advanced by the Herald before this Court, the majority did not conflate or disregard this Court's teachings regarding the standard of review. The factual predicate for the balancing is reviewed for clear error, as are factual findings of the

trial court in most cases. The trial court's determination of the relative weights is reversed only if the trial court clearly erred in assigning a weight to the conflicting interests of the parties.

The Herald also relies on the dissent to argue that credibility is not at issue in FOIA cases and "most certainly is not an issue in *this* FOIA case; the trial court here made its decision after an *in camera* review of the Doyle letter in which credibility determinations played no part." (Dissenting Opinion; Apx 26b). The sweeping assertion that credibility is not generally at issue in FOIA cases and "most certainly" was not at issue here finds no support in the record or the law. Credibility of the requesting party's statement of interest in the disclosure may be at issue. And credibility of the public body is also regularly at issue in determining factual context within which to weigh the public's interest in nondisclosure. To be sure, credibility determinations made on the basis of documents rather than live testimony are easier to second-guess on review. But trial courts often make credibility findings on the basis of deposition transcripts and affidavits. In this case, credibility determinations regarding the public body's explanation of the context necessarily supported the Board because the Herald conceded the Board's offer of proof as to the context. But that does not change the standard of review; it merely affects the basis on which the trial court was to conduct its balancing. See *United States v Stevenson*, 396 F3d 538 (CA 4, 2005).

The Herald cannot meet the clearly erroneous standard. The Herald has not pointed to any clear error regarding the factual context; it could not since it conceded this part of the case. The decision therefore principally involved the circuit court's balancing of the public interests in disclosure or nondisclosure of the letter. (Opinion and Order, 3/12/04, p 4; Apx 9b). Deference is properly afforded the trial court's decision regarding the relative weight of the competing interests. Upon affording the proper degree of deference to the circuit court, the end result is clear: The Doyle letter falls within the FOIA exemption for frank communications. The Court of Appeals correctly applied the standard here. Its ruling should be upheld.

ARGUMENT II

THE CIRCUIT COURT CORRECTLY UPHELD EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS' DECISION TO EXEMPT A LETTER FROM DISCLOSURE WHERE THE LETTER SATISFIED ALL ELEMENTS OF MCL 15.234(1)(m) AND THE BALANCE OF INTERESTS IN THE PARTICULAR INSTANCE SUPPORTS THE CONCLUSION THAT THE PUBLIC INTEREST IN THE QUALITY OF THE UNIVERSITY'S DELIBERATIVE DECISION-MAKING PROCESS CLEARLY OUTWEIGHED THE PUBLIC INTEREST IN DISCLOSURE WHERE ALL OF THE FACTS HAD BEEN RELEASED AND WERE PART OF THE PUBLIC RECORD.

A. THE TEXT, HISTORY, AND ORIGINS OF THE EXEMPTION SUPPORT THE BOARD'S POSITION.

The frank communication exemption, found at § 13(1)(m) of FOIA, provides the following:

> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

MCL 15.243(1)(m) is known as the "frank communications," "inter-agency," or "deliberative process" exemption. It can be traced to principles originating in the English "crown privilege," the executive privilege, the common law deliberative process privilege, the exemption for inter-agency and intra-agency memorandums or letters as set forth in 5 USC 552(b)(5), and to constitutional separation of powers principles. See generally Russell L. Weaver, *The Deliberative Process Privilege*, 54 Mo L R 279, 280-285 (1989). Analysis of these origins sheds some light on the purpose, scope, and interests that Michigan's Legislature contemplated when adopting 15.243(1)(m).

The English "crown privilege" kept documents from disclosure because the public interest was paramount and overrode the private interests of the litigants. See 3 Rev of Int'l Comm'n of Jurists, 29 (1969). Thus, an English court barred a report of a military inquiry into an officer's conduct from disclosure because it was privileged. *Home v Bentinck*, 129 Eng Rep 907 (Ex Ch, 1820); *Beatson v Skene*, 157 Eng Rep 1415, 1421-1422 (Ex, 1860). The well-known scholar, Sir James Fitzjames Stephen explained that "No one can be compelled to give evidence relating to affairs of State, or as to official communications between public officers upon public affairs, except with permission of the officer at the head of the department concerned...." James Stephen, *A Digest of the Law of Evidence*, art 112 (3d ed, 1877). These and other early English decisions protected the deliberations of those in the government from disclosure.

Early American decisions traced recognition of a privilege barring such disclosures to English crown precedents. In *United States v Burr*, 25 F Cas 30, 37 (1807), for example, Chief Justice Marshall concluded that a letter in the possession of the President Jefferson could be subpoenaed by Aaron Burr who was on trial for treason but also observed that if the executive sought to protect it from disclosure because it contained any "matter the disclosure of which would endanger the public safety," it would be suppressed. *Id.* at 37. Even then, some implicit balancing seemed to have been used since, after recognizing that public interest might require protection of the document, Chief Justice Marshall pointed out that "[s]uch documents have often been produced in the courts of the United States and the courts of England." *Id.* Other courts followed Chief Justice Marshall's approach. See e.g., *Gray v Pentland*, 2 Serg & Rawle 23; 1815 WL 1282 (1815); *Morris v Creel*, 4 Va 49; 2 Va Cas 49 (1816); *Thompson v German Valley Railroad Co*, 22 NJ Eq 111; 1871 WL 6722 (1871); *Appeal of Hartranft*, 85 Pa 433; 1877 WL 13389 (1871). Although these early decisions did not recognize the deliberative process

privilege by name, they protected materials of the sort today encompassed with the FOIA exemption at issue in this appeal.

The deliberative process privilege itself can be traced to several more recent decisions: *United States v Morgan*, 304 US 1, 18; 58 S Ct 773; 82 L Ed 1129 (1938), *Kaiser Aluminum & Chemical Corp v United States*, 157 F Supp 939, 946 (Ct Cl, 1958), and *Carl Zeiss Stiftung v VEB Carl Zeiss, Jena*, 40 FRD 318, 325-26 (D DC, 1966) aff'd sub nom *VEB Carl Zeiss, Jena v Clark*, 384 F2d 979 (DC, Cir) cert denied 389 US 952 (1967). In *Morgan*, the United States Supreme Court protected the mental processes of government decisionmakers explaining that "it was not the function of the court to probe the mental processes of the Secretary [of Agriculture] in reaching his conclusion if he gave the hearing which the law required." 304 US at 18. *Kaiser Aluminum* extended the *Morgan* rule to recognize a privilege not to produce documents that include recommendations and advice on policy issues. 157 F Supp at 943-947. Because the document sought would "lay bare the discussion and methods of reasoning of public officials," the court determined that it would be contrary to the public interest to be produced. *Id.* at 947. The court reasoned that the request went "beyond the disclosure of primary facts upon which the conclusions are based," it was akin to an effort to gain access to "written statements and mental impressions contained in the files and mind of the attorney." *Id.* quoting *Hickman v Taylor*, 329 US 495, 509; 67 S Ct 385, 392; 91 L Ed 451 (1947). Because the entity requesting the document failed to demonstrate any need for it to develop the facts, the Court held that the claim of privilege was well founded. *Id.* at 947.

Carl Zeiss Stiftung likewise involved an effort to obtain government documents that pertained to intra-governmental advisory and deliberative communications. 40 FRD at 324. The court explained that this privilege requires an "adjustment between important but competing interests." *Id.* The court's rationale for "striking the balance in favor of nondisclosure of intra-

governmental advisory and deliberative communications" was because it facilitates a "policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate." *Id.* According to the court, the "rule immunizing intra-governmental advice safeguards free expression by eliminating the possibility of outside examination as an inhibiting factor." 40 FRD at 326. This "preserve[s] the integrity of the deliberative process itself." *Id.* The court found it "evident that to demand pre-decision data is to at once probe and imperil that process." *Id.* The court then explained that recognizing these justifications for nondisclosure does not mean that other interests will never outweigh the government interests. Instead, the court weighs the detrimental effects of disclosure against the claimant's demonstration of the need for the documents. *Id.* at 327.

When it enacted the federal Freedom of Information Act (FOIA), Congress gave the deliberative process privilege a statutory analogue in exemption five, which incorporated a number of judicial privileges enjoyed by the federal executive. *EPA v Mink*, 410 US 73; 93 S Ct 827; 35 L Ed 2d 119 (1973); *NLRB v Sears, Roebuck & Co*, 421 US 132; 95 S Ct 1504; 44 L Ed 2d 29 (1975). See generally, John Louis Kellogg, *What's Good for the Goose... Differential Treatment of the Deliberative Process and Self-Critical Analysis Privileges*, 52 Wash U J Urban & Contemp L 255, 263-266 (1997). The federal FOIA exemption was created to serve three traditionally recognized purposes of the deliberative process privilege: (1) to assure that predecisional opinions and recommendations will flow freely from subordinates to decisionmakers, without fear of public ridicule or criticism, (2) to protect against prematurely disclosed policies or opinions, keeping them from release before they are officially adopted as agency policy; and (3) to protect from misleading the public with opinions and recommendations that may have played only a minor role in the policy decision, but were not actually the deciding factor. *Coastal States Gas Corp v Dep't of Energy*, 617 F2d 854, 866 (DC Cir, 1980). The

ultimate purpose, as recognized by the United States Supreme Court, is to prevent injury to the quality of government decisions. *NLRB v Sears, Roebuck & Co*, 421 US at 152, 95, S Ct at 1516. In other words, Congress sought to ensure that candid and preliminary communications remain confidential so that the government receives the benefit of a full discussion and the public is not confused or misled by disclosure of inaccurate or poorly thought-out comments.

This Court has taught that it is appropriate to look to federal case law when interpreting a state statute that parallels its federal counterpart. *State Employees Ass'n v Dep't of Management & Budget*, 428 Mich 104, 117; 404 NW2d 606 (1987). The federal act, PL 89-487, 80 Stat 250 (1966), was codified at 5 USC 552 by PL 90-23, 81 Stat 54 (1967). Major amendments were enacted in 1974 by PL 93-502, §§ 1-3, 88 Stat 1561-1564. The act was amended further by PL 94-409, § 5(b), 90 Stat 1247 (1976); PL 95-454, Title IX, § 906(a)(10), 92 Stat 1225 (1978). It preceded its Michigan counterpart by some ten years and served as a model for the state legislation. *Kestenbaum v Michigan State University*, 414 Mich 510; 327 NW2d 783 (1982).

Michigan's exemption, MCL 15.243(1)(m), like exemption five of the federal FOIA statute, is drawn from a large body of case law. Although the text of the Michigan exemption does not precisely mirror the text of the federal statute, the language tracks distinctions and concepts that were derived from the judicial decisions explicating the deliberative process privilege. Congress adopted a broader exemption; it protects all documents that satisfy the threshold criteria from disclosure. The Michigan Legislature embraced the same threshold criteria as in exemption five, but rather than create a per se exemption, included a balancing test for disclosure or nondisclosure. This test was drawn from the judicial decisions applying the common law deliberative process privilege in the context of evidentiary disputes. To invoke MCL 15.243(1)(m), the public body must show that (1) the communications and notes were made within a public body or between public bodies; (2) they were of an advisory nature and

cover other than purely factual materials; and (3) they were preliminary to a final agency determination of policy or action. MCL 15.243(1)(m). These requisites are set forth in the text and have been regularly applied by Michigan courts. See e.g. *The Herald Co v The Ann Arbor Public Schools*, 224 Mich App 266, 274; 568 NW2d 411 (1997). If the documents meet those criteria, the public body must also establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure. *Id.*

The Court of Appeals' majority recognized that, in enacting this exemption, the Legislature had determined that "the public's interest in promoting frank communications necessary to the proper functioning of government may, at times, outweigh the disclosure policy of FOIA." (Opinion, p 7; Apx 17b). The Court of Appeals correctly read the exemption to be based on a legislative recognition that "there are special cases in which nondisclosure better serves the public's interest in good governance." (*Id.*) The Court of Appeals observed that other state courts had expressed similar reasoning recognizing the important public interest in frank communications. (*Id.*) For example, the Court of Appeals discussed *In the Matter of Shaw*, 446 NY Supp 2d 855, 856 (NY, 1981). There, a New York court described New York's "deliberative process" exemption, which was "enacted to foster open and candid discussion among public officials and to protect uninhibited recommendations, made within the family, from being scrutinized by those affected and by the public." *Id.*

The Court correctly read the Michigan exemption to require a trial court to ask and to answer the following questions: (1) did the public body show that the requested document covers "other than purely factual materials"; (2) did the public body show that the document is "preliminary to a final agency determination of policy or action"; and (3) did the public body

"establish that the public interest in encouraging frank communications within the public body or between public bodies clearly outweighs the public interest in disclosure"? (*Id.*, p 8; Apx 18b).

The circuit court's analysis comported with this approach. The circuit court found that:

(1) The letter contained substantially more opinion than fact, and the factual material is not easily severable from the overwhelming majority of the contents: Doyle's views and opinion concerning the President's involvement with the University House Project.

(2) The letter was preliminary to a final determination of policy or action by the Board. The communication was between officials of public bodies. The letter contained the Board's investigations and ultimate determination of what action, if any, would be taken regarding the University House controversy.

(3) The public interest in encouraging frank communications within the public body or between public bodies clearly outweighed the public interest in disclosure. The Herald Company's specific need for the letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house," or the public's general interest in disclosure is outweighed by the Board's interest in maintaining the quality of its deliberative and decision-making process.

(4) The Board conducted an investigation and recently published a "voluminous and exhaustive report" concerning its findings regarding the University House project, a copy of which was furnished to plaintiff.

(Opinion and Order, 3/12/04, p 4; Apx 9b).

The Herald urges this Court to reverse the judgment in favor of the EMU Board of Regents because FOIA is a pro-disclosure statute, the burden of proof is on the public body, and the exemption must be narrowly construed. (Brief on Appeal, pp 12-14). But these general principles, while true, do not advance the analysis. This Court taught in *Federated Publications* that when the Legislature has designated a specific class of records as exemptible, some attribute of those records prompted the Legislature to create the exemption and "in performing the requisite balancing of public interests, the circuit could should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records." *Federated*

Publications, 467 Mich at 110. And certainly, as the Court of Appeals acknowledged, "the Legislature clearly determined that there are certain circumstances where revealing information would undermine rather than further good governance." (*Id.*, p 8; Apx 18b).

The question before this Court is whether to uphold the trial court's weighing and balancing of the interests within the factual context presented in this particular instance. The Herald concedes, as it must, that the first three elements of the exemption are satisfied. The document is a note or communication within a public body, it is not purely factual, and it was preliminary to deliberations and decisions of the public body on the subject discussed. The only element challenged on appeal is whether the circuit court properly balanced the interests at stake to uphold the Board's decision not to disclose the letter.

The balancing of interests is properly done within the context of the particular facts. Doing so, the trial court found that the public interests predominate. Former EMU Vice President for Business and Finance, Patrick Doyle, wrote the letter on September 3, 2003. (Opinion and Order, p 2; Apx 7b). Doyle sent the letter to EMU Regent, Jan Brandon. (*Id.*) According to the circuit court, the letter contains "Doyle's views concerning the President's involvement with the University House project." (*Id.*, p 4; Apx 9b). The circuit court described the contents of the letter as a summary of events from Doyle's perspective in which Doyle exercised judgment in selecting factual material, evaluated its relative significance, and used it to facilitate the impact of his opinions. (Opinion and Order, p 3; Apx 8b). The circuit court found that the letter was between officials of public bodies, was preliminary to a final determination of policy or action, and concerned what action, if any would be taken regarding the University House controversy. (*Id.*, p 4; Apx 9b). According to the circuit court, the "Board of Regents subsequently published a 'voluminous and exhaustive report of its investigation into the University house controversy' and the Herald was furnished a copy. (*Id.*, p 3; Apx 8b). The

Herald has not, and can not dispute any of these factual assertions given its concession that the factual context existed as asserted by the Board. (Tr, 2/18/04, pp 6-7; Apx 103b-104b). Thus, the Court of Appeals correctly upheld the trial court's decision.

B. IN THE PARTICULAR INSTANCE, THE PUBLIC HAS A COMPELLING INTEREST IN CANDID AND CONFIDENTIAL COMMUNICATION TO THE BOARD AS A PART OF ITS DELIBERATIVE PROCESS.

In this particular instance, the public interest in nondisclosure is especially strong. Doyle's letter was directed to a member of the Board, the body charged with governing EMU.[3] The nature of the communications here was sensitive. The public interest in non-disclosure falls at the core of the policy considerations that prompted the Legislature to enact this exemption. The record demonstrates that a high-level, but subordinate university official, a vice-president for finance, offered candid communication to the decisionmakers at a university about an incident of high public controversy. The circuit court's decision is consistent with the public interest concern reflected in the exemption statute, which is to encourage frank communication between officials and employees in reaching a decision on a course of action.

As the majority's opinion so aptly noted, the Board needs more than cold and dry data to do its job. It requires the "unvarnished candid opinion of insiders" to make policy judgments and particularly to conduct sensitive investigations involving top administrators. The Court of Appeals acknowledged the substantial risk that vital sources of candid opinions would dry up were insiders justifiably fearful that their candid appraisals would be published to the public at large. The Court of Appeals found that to be especially true where, as here, the Board was

---

[3]The dissent made several unfounded factual assertions that improperly add facts not to be found in the record. (Dissenting Opinion, pp 1-12; Apx 26b-37b). These statements cannot be gleaned from the assertions or filings of the parties, were not findings of the trial court, and constitute speculation based on press accounts or a veiled effort to signal the contents of a document filed under seal, the disclosure of which is the very issue before the Court. This Court should not rely on the dissent as a basis for any facts nor should it permit the Herald to do so.

investigating potential misconduct of a high ranking official and sought out the insight of other high ranking officials who worked for and side-by-side with the target of the investigation. Consistent with the trial court's ruling, the Court of Appeals agreed that making Doyle's letter public would likely hurt, not advance, the public interest. That prompted the Court of Appeals to observe that:

> Indeed, this factual scenario strikes us as the prototype the legislature had in mind when it adopted the "frank communication" exemption in FOIA. The express recognition by the legislature of the need for candor and its vital role in internal decision-making and internal investigations gave birth to the "frank communications" exemption and were we to hold the exemption inapplicable under these facts, this may very well sound the death knell of this vital tool for board members to discharge their oversight roles for the benefit of the public.

(Opinion, p 12; Apx 22b).

In *Federated Publications*, the Court instructed that "in performing the requisite balancing of public interests, the circuit court should remain cognizant of the special considerations that the Legislature has accorded an exemptible class of records." 467 Mich at 110. The circuit court did so here and properly analyzed the competing interests to conclude that the Herald's "specific need for the letter, apparently to 'shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the president's house,' or the public's general interest in disclosure, is outweighed by defendant's interest in maintaining the quality of its deliberative and decision-making process." (Opinion and Order, p 4; Apx 9b).

The document at issue here constitutes the prototypical document for which this exemption was created. It involves the candid communication of a high government official directed toward the decisionmakers charged with responsibility for a public body as it considers a matter of controversy. The courts have expounded on the legitimate concern that disclosure will impede a public body's ability to obtain critical input on numerous occasions. "Human

experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." *United States v Nixon*, 418 US 683, 705; 94 S Ct 3090; 41 L Ed 2d 1039 (1974). Whether criticizing someone else's performance or acknowledging omissions or mistakes in one's own, the temptation for an individual temper his remarks if he believes they will be broadly disseminated thus subjecting him to criticism or attack is likely to be overwhelming in many instances.

Courts have considered the reach of the deliberative process privilege in light of its purpose; their analysis is instructive and supports the Board's position that the public interest in nondisclosure in this instance is strong. In *City of Colorado Springs v White*, 967 P2d 1042 (Colo, 1998), after tracing the history of the privilege, the court explained that its ultimate goal is to prevent the "quality of agency decisionmaking from deteriorating as a result of public exposure." 967 P2d at 1049 quoting *Schell v United States Dep't of Health & Human Services*, 843 F2d 933, 939 (CA 6, 1988). The court characterized the primary purpose for recognizing the privilege as "protect[ing] the frank exchange of ideas and opinions critical to the government's decisionmaking process where disclosure would discourage such discussion in the future." 967 P2d at 1051.

The key to whether the document should be made available is whether "the disclosure of the material would expose an agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* Predecisional documents are subject to protection. *Id.* at 1051. Predecisional material retains its protection from disclosure even after a decision is made. *Id.* at 1052. Documents in which the factual material is so inextricably intertwined with the deliberative sections that disclosure will ultimately reveal the government's deliberations falls within the

privilege. *Id.* at 1052. The privilege is more likely to apply to documents from subordinates to their superiors than the other way around. *Id.* Disclosure of documents that are candid or personal in nature is also more "likely in the future to stifle honest and frank communication within the agency." *Id.* quoting *Coastal States Gas Corp v Dep't of Energy*, 617 F2d 854, 866 (DC Cir, 1980). These principles apply here where Doyle's letter is a predecisional candid communication from a high official about his superior and to his ultimate superiors, the governing board of a university.

One federal appellate court recognized the importance of maintaining the privilege to assure that subordinates will feel free to provide an agency with "their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism." *Coastal States*, 617 F2d at 866. Another court put it this way:

> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view - a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

Ackerly v Ley, 420 F2d 1336, 1341 (DC Cir, 1969). In other words, the privilege is "rooted in the need for confidentiality to assure that presidential [and here the Board of Regents'] decisionmaking is of the highest caliber, informed by honest advice and full knowledge." *In re Sealed Case*, 116 F3d 550, 570 (DC Cir, 1997). The confidentiality afforded by nondisclosure "is what ensures the expression of 'candid, objective, and even blunt or harsh opinions' and the comprehensive exploration of all policy alternatives before a presidential [and here university] course of action is selected." 116 F3d at 570.

Michigan's exemption is similarly intended to guard against FOIA disclosures that would imperil public decisionmaking by depriving the decisionmakers of the advice, impressions,

comments, and candid opinions that they need. If the disclosure threatens to reveal candid and unvarnished comments assessing blame or accepting responsibility for a poor outcome, then disclosure may expose the hapless bureaucrat to public criticism or to attack from others within the public body who may disagree with his or her judgment. Disclosure of these kinds of communications renders it increasingly unlikely that others will ever put such thoughts in writing in the future. Thus, the public interest in nondisclosure to assure the candor of future communications is high.

Michigan appellate courts have previously upheld circuit court rulings to the effect that documents are exempt from disclosure under MCL 15.243(1)(m) in these circumstances. These rulings lend support to the lower courts' analyses in this case. In *Traverse City Record Eagle v Traverse City Area Public Schools*, 184 Mich App 609, 612-613; 459 NW2d 28 (1990), the court agreed that a tentative collective bargaining agreement could be withheld from disclosure because confidentiality was necessary to "maintain frank communication between the union and the school board." *Id.* The interest in frank communication clearly outweighed the public's right to disclosure. *Id.*

In *Favors v DOC*, 192 Mich App 131; 480 NW2d 604 (1991), the court concluded that the public interest in encouraging frank communication within the DOC clearly outweighed the public interest in disclosure of the worksheet forms.

> The public has a clear interest in encouraging the members of disciplinary credit committees within the department to communicate frankly with a warden with regard to the issue of inmate disciplinary credit, an issue that affects the length of an inmate's incarceration. The public has a far greater interest in issuing that these evaluations are accurate than in knowing the reasons behind the evaluation.

192 Mich App 131, 136. To ensure candor in the evaluations, the Court upheld the government decision not to disclose them.

Likewise, in *McCartney v Attorney General*, 231 Mich App 722, 734-735; 587 NW2d 823 (1998), the court affirmed a lower court decision that internal memoranda fell within MCL 15.243(1)(n).[4] It noted that the contents of the memoranda were preliminary, non-factual, and part of "the deliberative activity necessary to the defendant." *Id.* at 734. The memos reiterated discussions between an assistant attorney general and the governor's office and contained "recommendations, opinions, and strategies regarding the tribal-state compacts and communicated the assistant's thoughts and impressions." *Id.* at 733. The Court of Appeals ruled that the public interest in encouraging frank communications between officials and employees in the defendant's office clearly outweighs the public interest in disclosure in this case. *Id.* at 734. In sum, the public interest in nondisclosure in this case falls at the very highest level. The trial court's determination that the interest is high is not clearly erroneous. Thus, it should be affirmed.

C. WHERE THE BOARD PUBLISHED A VOLUMINOUS AND EXHAUSTIVE REPORT ON THE UNIVERSITY HOUSE PROJECT, THE PUBLIC INTEREST IN DISCLOSURE IS LOW.

As conceded and stipulated to by the Herald at the oral argument before the trial court, the letter was written by the former EMU Vice President for Business and Finance, Patrick Doyle, to EMU Regent, Jan Brandon. (Tr, 2/18/04, pp 6-7; Apx 103b-104b). The Herald indicated that it believed that the letter pertained to the University House project, which was "the subject of a highly publicized investigations into a variety of matters." (Complaint, ¶16; Apx 42b-43b). The Herald sought disclosure of the letter to vindicate "the public's interest in monitoring the expenses related to the President's house and in monitoring the administration of the University by its elected and appointed officials." (*Id.*)

---

[4]The exemption, now found at MCL 15.243(1)(m), was previously found at 15.243(1)(n).

Analysis of the public interests at stake in the particular interest requires balancing this claimed interest as articulated by the Herald against the public interests in nondisclosure. Because this balancing occurs in the particular instance, the trial court evaluated the interests within the factual context as shown by the record. Notably, by the time of the hearing, the University had completed an investigation and published a voluminous and exhaustive report concerning its findings regarding the University House project, a copy of which was furnished to the Herald. Counsel for the Board of Regents pointed out that, apart from mental impressions, opinions, and candid comments, the letter would not allow the Herald (or the public) to learn anything that it did not already know from the prior exhaustive disclosures of the University. (Tr, 2/18/04, pp 11-12; Apx 108b-109b). The "University had disclosed literally hundreds of pages of an investigation and report that was prepared by the Deloitte firm[5] with literally hundreds of pages of factual information supporting that report." (Tr, 2/18/04, p 11; Apx 108b). Since the Herald's counsel specifically agreed not challenge any offer of proof that the Board put in regarding the context of the letter, this exhaustive disclosure regarding the facts must be taken as true by the trial court and this Court. (*Id.*)

Additional evidence of the prior public knowledge regarding the relevant facts can be seen from the FOIA requests submitted to the University along with the request for this letter, copies of which were attached to the Herald's complaint. (Exhibits A-C to Complaint; Apx 45b-50b). The letter from the University to the Herald reveals that the University disclosed hundreds of additional documents pertaining to budgets and amended budgets relating to how much EMU intended to spend, or spent, on construction of the University House. (Complaint, Exhibit B; Apx 49b). The correspondence indicates that the Herald requested (and the University disclosed)

---

[5]The University had retained the well-known accountant firm, Deloitte & Touche, to conduct a forensic audit, all of which was disclosed to the public. A second audit by the State of Michigan Office of the Auditor General was also underway.

documents showing bank accounts used to pay contractors for construction of the University House, landscaping of its grounds, parking facilities, and any other improvements related to the project including expenses for it that were charged to other university accounts, such as campus beautification or physical plant. (*Id.*) The FOIA request also sought (and obtained) invoices submitted by contractors and subcontractors, along with documents showing how much they were paid from the start of the project to the time of the request. (*Id.*; Apx 45b-50b). The FOIA request sought (and obtained) copies of change orders approved by the university during the construction of the University House, documents used to solicit bids for its construction, copies of bids received by the university, a list of sources and amounts of funding for the project, and resolutions authorizing construction and any subsequent resolutions relating to it. (*Id.*) The request also pertained to fees, salary, or other income paid to the wife of the university president for work done on the project. (*Id.*)

The disclosures from these comprehensive FOIA requests coupled with the release of the Deloitte & Touche audit report and supporting documents meant that the facts regarding the project were in the public domain at the time this litigation began, a finding which the Herald basically conceded in accepting the Board's counsel's offer of proof at the hearing. Given the unrefuted lower court record demonstrating that the facts pertaining to the University House had been disclosed to the public both through the voluntary release of a forensic audit by a recognized outside accounting firm and through voluminous FOIA disclosures, the public interest in disclosure of this letter was and is low.

When the facts relating to or included within a communication are already public, the public interest in disclosure is low. The court in *Montrose Chemical Corp v Train*, 491 F2d 63, 69 (DC Cir, 1979) refused to disclose the evaluation when the facts were already public:

> Similarly, our case here is to be distinguished from a situation in which the only place certain facts are to be found is in the administrative assistants' memoranda. Here all the facts are in the public record. What is not in, and should not be in, the public record is the administrative assistants' evaluation and selection of certain facts from the 9200-page public record.

As in *Montrose Chemical*, by virtue of publication of the Deloitte & Touche audit report and the release of hundreds of other documents, the facts had been released and were a part of the public record. Given the disclosure of all these facts, both the press and the public as a whole were well-situated to assess responsibility and blame. They had access to all the facts regarding the expenditures, the approval process for expenditures, the decisions made, and the outcome. With this information, they could (and did) question, support, or attack the officials in charge, including the Board itself, and the then-President of the University.

The public interest in disclosure of one individual's opinion regarding aspects of the issue is relatively unimportant to the public unless it becomes embodied in a decision or policy made by the governing body. The public need is for the facts and decisions of the public body. Once these are in the public domain, the public can reach its own conclusions and can listen to the conclusions of others as part of the public debate. Then, the governing body takes the heat—or hears the praise for its decisions. This is appropriate since the governing body has constitutional authority for decisionmaking. See generally, Const 1963, art 8, § 4; Const 1963, art 8, § 6. The individual whose communication was offered to the Board is protected by nondisclosure to ensure that, in the future, such opinions are not so sanitized as to be useless. Ensuring the public body access to such predecisional candor is essential for protecting the quality of its deliberations. Given that the facts regarding the controversy were in the public domain, the public interest in disclosure of the letter was low. All that remained for disclosure was Doyle's opinions, judgments, or impressions. And as to those, the public interest is low.

D. THE TRIAL COURT'S JUDGMENT REGARDING THE BALANCE OF INTERESTS SHOULD BE AFFIRMED BECAUSE THE PUBLIC INTEREST IN NONDISCLOSURE OF THE DOYLE LETTER PREDOMINATES.

It cannot be said that the trial court clearly erred in ruling that the public interest in non-disclosure predominates here. Speaking of the "delicate balance" between the public interest in disclosure and the public interest in non-disclosure, the trial court carefully appraised the special circumstances and all relevant facts to ensure that the correct balance was struck. The Court of Appeals was correct in according great deference to the trial court's ruling. Candid appraisals by subordinates of their supervisors at the highest level of a university administration is necessary to the implementation of its governing board's effective oversight role. It cannot be said that the trial court clearly erred.

Absent from the Herald's analysis is any recognition of the Court's instruction in *Federated Publications, supra*, to the effect that "in undertaking this balancing, however, the circuit court must consider the fact that the inclusion of a record within an exemptible class ... implies some degree of public interest in the non-disclosure of such a record." *Federated Publications, supra* at 109. Under the scheme created by MCL 15.243(1)(m), writings are disclosable unless the public body shows in the particular instance that the public interest in the disclosure of a particular piece of information may be "clearly outweighed" by certain discriminating realities. That serves to establish the point that the public interest in good governance may also be served by the non-disclosure policy illustrated by specific exemptions such as the frank communications exemption. Accordingly, in performing the requisite balancing of public interest, a trial court must remain cognizant of the special consideration that the legislature has afforded to the exemptible class of records, *Federated Publications, supra* at 110.

The trial court concluded that the Board's need to maintain the quality of its deliberative and decisionmaking process outweighed any public interest in disclosure given the exhaustive disclosures made by the University. Release of the Doyle letter would discourage the preparation of such letters or memoranda and would impact negatively on the quality of the Board's decision-making process with detrimental effect on the services provided to EMU students, parents, and alumni as well as on the public at large. Thus, it must be said that, after careful in camera review of the Doyle letter, that the trial court did not err in its findings or in concluding that the Board satisfied its burden of proving that the Doyle letter fell within the exemption provided by § 13(1)(n). The facts regarding the authorizing resolutions, the bids, the purchases, the expenditures, were all in the public domain. The only material not in the public domain was Doyle's confidential and candid communication to the Board. But the public interest in these candid and preliminary comments is low, if not non-existent.

Doyle's comments, like those of any high level official, were not a policy or decision of the Board. They were preliminary. Thus, the public's interest in knowing them is significantly less than its interest in knowing the policies and decisions ultimately made by the Board. In addition, the public is fully capable of evaluating the Board's policies and decisions in light of the exhaustive factual disclosures made by the University.[6] The public can discern from the voluminous factual disclosures what funds were spent, whether the initial authorizations covered the eventual expenditures, and exactly what was received for these expenditures. The public can evaluate the Board's policies and decisions in light of these facts and draw their own

---

[6]The dissent's inexplicable and unsupported comment that all facts have not been disclosed should be disregarded since it must fall within one of three categories: (1) unsupported speculation, (2) clear error since it is contrary to the trial court's finding and the concession concerning the context made by the Herald, or (3) extrapolation from the filed-under-seal document in breach of the court's ethical obligation to maintain its secrecy until a majority had issued a binding decision to disclose it (which would not occur until after a reversal in the Court of Appeals or by this Court).

conclusions. The public interest in obtaining the facts regarding the expenditures and the history of the project is high, but does not weigh in favor of disclosure since it has been conceded that all the facts were already in the public domain. Thus, disclosure would not offer the public additional facts with which to evaluate the expenditure of public funds.

Disclosure of the letter would reveal Doyle's opinions and impressions and comments. The dissent apparently believes that the public has an interest in hearing whatever candid comments and communications Doyle may have made to the Board since they purportedly pertain to the president's expenditure of funds on the project. But these are exactly the kind of communications that the exemption is intended to guard against because it would inhibit future candid comments. The sole basis for disagreement advanced by the Herald (again taking its cue from the dissent) is that Doyle had already decided to retire and that he was critical of the president.

The argument that Doyle's retirement plans lessen the public interest in nondisclosure rests on a fundamental misconception regarding the exemption's purpose and operation. The dissent and the Herald misunderstand the nature of the public interests at stake. They speculate that since Doyle was planning to retire before he wrote his letter, he would have "no fears as to his future job security, or as to the president's 'favor.'" (Dissenting Opinion, pp 8-9; Apx 33b-34b). To be sure, Doyle's concerns may not have been based on job security or the president's favor. But the public has an even stronger interest in nondisclosure because of the chilling effect disclosure will have on future communications of this kind. See Weaver, *The Deliberative Process Privilege*, 54 Mo L Rev 279, 292-293 (1989); *United States v Capitol Service, Inc*, 89 FRD 578, 583 (ED Wis, 1981). Once Doyle's letter is disclosed, if the Board should request or receive future communications from high-level officials concerning future controversies these officials will be far less likely to speak freely. Knowing that Doyle's prior communication

became the subject of public comment and criticism, future officials will carefully guard their comments.

This forward-looking focus is inherent in the exemption. In every case balancing interests under the exemption, the public body already has the benefit of the candid communication at issue. Thus, whether it is disclosed or not, the public body has received the candid input from that communication. What is at stake is the public body's ability to obtain candid input in the future. If this disclosure prompts other individuals in the future to censor themselves rather than face publicity over their comments, then the public has lost the vital communications that are needed to inform the public body's decisionmaking process. The public therefore has a compelling interest in nondisclosure to preserve the quality of future decisionmaking. If Doyle's letter is disclosed, future insiders asked to comment to a university board about the university president's conduct or to explain their own conduct may well choose to limit their remarks to those that will offend no one or those that will place their conduct or that of others in a favorable light. The governing boards will therefore be deprived of critical information as they assess and evaluate the situation and decide upon a course of action.

Furthermore, and contrary to the dissent's view, the desire to avoid public and private criticism does not necessarily lessen because someone leaves a job. An individual's fear of job-related reprisals may lessen; but the belief that professional relationships may be harmed remains just as strong. An individual's own interests, reputational and otherwise, may be at stake. If an individual offers a judgment about an event of controversy knowing that it will be disclosed to the public and the press, the natural tendency will be to speak cautiously or self-protectively. Rather than face the criticism of others, both within and outside of the public body, an individual is quite likely to censor their words offering only those that will offend no one. An individual fearing disclosure may limit comments to narrow factual assertions, rather than presenting ideas,

comments, impressions, judgments, or criticisms. The protection of these subjective and opinionated comments lies at the heart of the exemption for frank communications.

The trial court exercised its discretion to weigh and balance these public interests. It concluded that the public interest in disclosure was low because the facts had been disclosed to the press and public. It concluded that the public interest in nondisclosure was high because the Board's ability to maintain the quality of its decisionmaking process by receiving frank communications from its officials and employees was at stake. This Court has held that reviewing courts should defer to the trial court's judgment on the relative weights of these interests. No clear error has been shown. Thus, an affirmance is in order.

ARGUMENT III

THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE DOCUMENT WAS NOT SUBJECT TO DISCLOSURE BECAUSE IT CONTAINED OTHER THAN PURELY FACTUAL INFORMATION WHICH COULD NOT BE DISCLOSED WITHOUT REVEALING THE PROTECTED CANDID COMMUNICATION.

MCL 15.243(1)(m), exempts from disclosure, "communications ... within a public body ... of an advisory nature to the extent that they [the communications] cover other than purely factual materials...." Stated otherwise, the exemption does not apply to either communications that are not advisory in nature or to communications that cover "purely factual materials." Again, by definition, a communication that is advisory in nature and contains "substantial factual materials" does not contain "purely factual materials" and is within the scope of the exemption. There simply is no requirement in FOIA that a communication be completely bereft of any factual material in order to qualify for the exemption.

The primary goal of judicial interpretation of statutes is no different for FOIA than it is for any other statute in Michigan: to discern and to give effect to the intent of the Legislature. *Federated Publications, Inc v The Lansing State Journal, supra* at 107. A court discerns legislative intent "by examining the specific language of a statute. If the language is clear, this Court presumes that the Legislature intended the meaning it has plainly expressed and the statute will be enforced as written." *Id.* Under such circumstances "a court is prohibited from imposing a 'contrary judicial gloss' on the statute." *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490; 672 NW2d 849 (2003), quoting *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc)*, 468 Mich 109, 119; 659 NW2d 597 (2003).

The language of MCL 15.243(1)(m) is clear and unambiguous. It exempts from disclosure communications that are advisory in nature. The exemption applies if the materials are "other than purely factual." In *Favors v DOC, supra*, for example, the Court of Appeals

concurred in the trial court's conclusion that the public record sought by plaintiff, a goldenrod-colored worksheet copy of form CSR-482, came within the scope of MCL 15.243(1)(m). The goldenrod-colored copy of the form covered "other than purely factual matters" because it provided a space for the disciplinary credit committee members to explain their recommendations concerning an award of disciplinary credit to an inmate. The comment sheet was designed to allow the committee members to state their candid impression regarding the inmate's eligibility for disciplinary credits.

The language of Michigan's FOIA, that the exemption applies to "other than purely factual materials," finds its genesis in federal case law. Federal cases dealing with the analogous federal statute are therefore instructive in interpreting Michigan's statute. *State Employees Ass'n v Dep't of Management & Budget*, 428 Mich 104, 117-120; 404 NW2d 606 (1987); *The Evening News Ass'n v City of Troy*, 417 Mich 481, 427-428; 339 NW2d 421 (1983). The Michigan Legislature appears to have taken the language regarding factual and non-factual materials for its exemption directly from *EPA v Mink*, 410 US 73, 89; 93 S Ct 827; 35 L Ed 2d 119 (1973). In *Mink*, the Supreme Court noted: "Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policymaking processes on the one hand, and purely factual, investigative matters on the other." Significantly, the *Mink* court gave some legislative history on the federal FOIA that is germane to the issue before this Court:

> When the bill that ultimately became the Freedom of Information Act, S 1160, was introduced in the 89th Congress, it contained an exemption that excluded:
>
> "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy."
>
> This formulation was designed to permit "all factual material in Government records ... to be made available to the public." S Rep No 1219, 88th Cong, 2d Sess, 7 (1964). The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document

> simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to the public. n 18 As a result of this criticism, Exemption 5 was changed to substantially its present form.
>
> ---
>
> n 18 ... Federal Aviation Administration (1965 Senate Hearings 446):
>
> "Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency of the executive branch would not be protected by the proposed exemptions."

410 US at 90-91. It is clear from the text of MCL 15.243(1)(m) language that the Herald's reading of MCL 15.243(1)(m) is seriously flawed and, ultimately, incorrect. If there is any doubt after a textual analysis, this history should lay it to rest.

The exemption must be read as written to protect the evaluation and analysis embodied within an advisory communication. *Montrose Chemical Corp v Train*, illustrates the proper analysis. The court applied the exemption to protect from disclosure two factual summaries of evidence developed at a hearing before the administrator of the EPA. The summaries were prepared by EPA staff at the direction of the administrator. Specifically, he requested three EPA attorneys to review the record made at the hearings and to direct the preparation of analyses of the evidence. Two documents were produced as a result: "Analysis of Risks Attributed to DDT" and "Summary and Analysis of Evidence of Benefits." The summaries were to be used by the administrator in his study of the record and were based wholly on evidence in the record of the hearings. *Id.* at 65. In holding that the summaries were exempt form disclosure, the court stated:

> The EPA assistants here were exercising their judgment as to what record evidence would be important to the Administrator in making his decision regarding the DDT regulations. Even if they cited portions of the evidence verbatim, the assistants were making an evaluation of the relative significance of the facts recited in the record; separating the pertinent from the impertinent is a judgmental process, sometimes of the highest order; no one can make a selection of evidence without exercising some kind of judgment, unless he is simply making a random selection.

* * *

> To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgmental scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process.

Id. at 68. The federal courts have recognized that factual material is often so interwoven with deliberative material that it cannot be severed. See e.g., *FTC v Warner Communications, Inc*, 742 F2d 1156, 1161 (CA 9, 1984); *Binion v Dep't of Justice*, 659 F2d 1189, 1193 (CA 9, 1983).

The *Mink* court explained that the exemption's use of the language "other than purely factual" was intended to allow for "the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." 410 US at 90. The test is whether the factual material appears in a "form that is severable without compromising the private remainder of the documents." *Id.* The language was inserted into the exemption in recognition of precisely the situation present in this case; documents submitted to government decisionmakers often "contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily 'inextricably intertwined with policymaking processes.'" 410 US at 92 quoting *EPA v Mink*, 464 F2d 732, 746 (DC Cir, 1971). When disclosure of the facts would lay bare the candid opinion, then the factual material is properly exempted.

In this case, the Herald has conceded that the Doyle letter covers "other than purely factual materials." But the Herald now takes the position that the exemption applies only if the entire content of the record is non-factual. The source for that rendition of the law is unidentified. It is certainly not the statute, itself, which by its unambiguous terms, applies unless

the record contains purely factual materials. ("to the extent that they cover other than purely factual materials...").

This Court has repeatedly cautioned against creating a judicial gloss that will change the meaning of a statute. See e.g. *Nawrocki v Macomb County Road Comm*, 463 Mich 143; 615 NW2d 702 (2000); *Kerbersky v Northern Michigan University*, 458 Mich 525; 582 NW2d 828 (1998). Yet, the Herald urges the Court to read into MCL 15.243(1)(m) a modification that would severely undercut the protection that the legislature provided when it enacted a provision including within the exemption "communication and notes" that "cover other than purely factual materials" that satisfy the other elements of the exemption. MCL 15.243(13)(1)(m). This language was carefully chosen and provides a line of demarcation—a communication that is not purely factual falls within the exemption if it satisfies the other criteria. The exemption is intended to cover communications that mention facts when disclosure of the factual material would undoubtedly disclose the opinions and judgments made by the public official or employee who authored the communication.

To circumvent this textual obstacle to its position, the Herald points to MCL 15.244(1) and argues that the circuit court erred in failing to exempt the factual portions of the Doyle letter. MCL 15.244 provides:

> (1) If a public record contains material which is not exempt under section 13, as well as material which is exempt from disclosure under section 13, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.
>
> (2) When designing a public record, a public body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

That language contemplates the separation of exempt from non-exempt material. But it also recognizes that it may be difficult or impossible to do so as to a particular record. When that is the case, the entire document is exempt from disclosure. In fact, MCL 15.244(2) explicitly notes that even a description of exempted material should not be disclosed if it would "defeat the purpose of the exemption." *Id.*

The trial court properly concluded that the Doyle letter was exempt from disclosure because the letter was "primarily a summary of events from Doyle's perspective." (Opinion and Order, 3/12/04, p 3; Apx 8b). The trial court further observed that "Doyle clearly exercised judgment in selecting factual material, evaluating its significance, and using it to facilitate his opinions." (*Id.*) Accordingly, any factual material in the letter "is not easily severable," and the letter is exempt from disclosure. As in the *Montrose* decision, the letter at issue contains Doyle's impressions, judgment, and candid comments as seen from his perspective. Protecting these impressions, judgments, and comments is critical to assuring that the EMU Board of Regents is able to obtain frank assessments in the future. Selective factual data interwoven with opinion is exempt from disclosure under § 13(1)(m) when its disclosure would reveal the protected communication.

This approach is further supported by *Barbier v Basso*, 2000 WL 33521028 (Mich App, 2000).[7] That decision reflects the Court of Appeals' determination that documents justifying a decision regarding the attorney general's potential participation in licensure hearings and as to the Department of Consumer and Industry Services' manner of processing cases in general fall within the exemption. *Barbier, supra* at 2-3. The discussion was "brutally frank" and the court agreed that the public interest in encouraging frank communications clearly outweighed any

[7]This decision is cited as persuasive authority pursuant to MCR 7.215(c)(1). As required a copy is supplied as an addendum to this brief.

public interest in disclosure. It did so despite its observation that "both memoranda contained substantially more opinion than fact," presumably because the fact and opinion, as here, could not be severed.

The Herald does not advance its case by criticizing the trial court's reliance upon *Barbier*. In its discussion of *Barbier*, the Herald attempts to distinguish the case by noting the Court of Appeals' conclusions that the plaintiff apparently did "not challenge the trial court's findings pertaining to defendant's satisfaction of the exemption's substantive conditions." The Herald then goes on to identify those "substantive conditions" as including first "the condition that each portion of the document being withheld contains "zero 'purely factual' material." (Brief on Appeal, p 30). According to the Herald, if the *Barbier* plaintiff did not challenge a finding that the documents contained "zero 'purely factual'" material, then *Barbier* is completely different from the case at bar where the trial court conceded that the Doyle letter contains some factual material. The Herald's analysis, implementing a proviso involving "zero" purely factual matter is a concept of the Herald's own making. It is not supported by the language of MCL 15.243(1)(n) which uses the terms "to the extent that they cover other than purely factual materials." Simply stated, the Herald cannot so lightly dismiss the discussion found in the *Barbier* case or "some unfortunate passing dictum that appears in the ... decision." No doubt that, to the extent possible, information subject to disclosure under FOIA and information subject to exemption from disclosure under FOIA should be segregated. *Manning v East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999). But that cannot always be accomplished.

The public interest in encouraging frank communications between EMU staff and the Board in this particular instance clearly outweighs the public interest in disclosure of the Doyle letter. The public has a clear and well-defined interest in encouraging the members of the EMU community to participate with, to assist, and to communicate frankly with Board members with

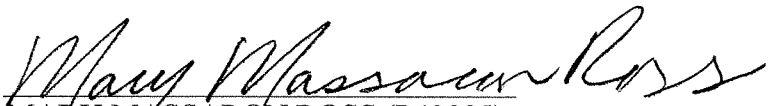
regard to issues over which the Board members has supervisory control. The public has a far greater interest in knowing the facts regarding the controversy and being told the public body's decisions and determinations. The information related to these are, as they should be, public. The only thing that remains protected is Doyle's communication, which contains his frank communication to the Board. The trial court found that the factual and nonfactual material in the letter could not be readily served. In essence, the trial court determined that disclosure of any purportedly factual portions would defeat the purpose of the exemption. Thus, the trial court agreed with the University's decision to withhold it from disclosure. That ruling was correct and properly affirmed on appeal. This Court should therefore affirm the lower court rulings in this case.

RELIEF

WHEREFORE, Defendant-Appellee the Eastern Michigan University Board of Regents respectfully requests that this Court affirm the judgment in its favor and grant it such other relief as is warranted in law and equity.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

MARY MASSARON ROSS (P43885)
MICHAEL S. BOGREN (P34835)
Attorney for Defendant-Appellee
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

DATED: September 21, 2005